## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA OFFICE

BIG MOOSE, LLC

and Case 15–CA–019735

HUMBERTO RECIO, an Individual

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES LOCAL 478 (THE GREEN LANTERN)

and Case 15-CB-005998

HUMBERTO RECIO, an Individual

Zachery E. Herlands, Esq.,
for the General Counsel.

Allan H. Weitzman, Esq. and Christopher L. Williams, Esq.,
for the Respondent Employer.

Louis L. Robein, Esq. and Paula M. Bruner, Esq.,
for the Respondent Union.

## SUPPLEMENTAL DECISION

MICHAEL A. MARCIONESE, Administrative Law Judge. On December 13, 2012, the Board issued its order in the above case affirming, in part, my initial decision in this case and remanding in part. Specifically, the Board found that the Respondent Employer, Big Moose, LLC, violated Section 8(a)(1) and (3) of the Act by terminating the Charging Party, Humberto Recio, on March 11, 2010<sup>1</sup> at the request of the Respondent Union, IATSE Local 478, because Recio was not a member of that Union, and violated Section 8(a)(1) when its supervisor, Earl Woods, told Recio that he could not work for the Employer until he transferred his membership to the Union. The Board further found that the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) by requesting Big Moose to terminate Recio on March 10, and violated Section 8(b)(1)(A) when Business Agent McHugh told Recio, on March 17,

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All dates are in 2010 unless otherwise indicated.

that he could not work within the Union's geographic jurisdiction until he completed his transfer application, which caused him to turn down employment opportunities in Louisiana.

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The Board remanded that portion of the case relating to a second alleged unlawful termination, again allegedly at the request of the Union, on April 28. I had recommended dismissal of this allegation on the basis that the Acting General Counsel had not met the burden of proof that the Union requested Recio's second termination or that Big Moose terminated him for discriminatory reasons. Believing that I had not specifically credited or discredited any of the three conflicting accounts of events on Recio's last date of employment, the Board remanded the issue of whether Recio quit his employment on April 28 or was fired, and if the latter, whether Big Moose acted at the Union's request.

Upon receipt of the Board's Order, I offered the parties an opportunity to file briefs or memoranda addressing the issues on remand. The Acting General Counsel and both Respondents filed briefs. The Respondent Union also filed, without objection, a reply brief addressing points raised in the Acting General Counsel's brief. Having reviewed the testimony and other evidence in the record regarding the April 28 allegation, and after considering the parties' briefs, I make the following supplemental decision:

As previously found, Recio has been employed in the motion picture and television production industry for more than 27 years as a rigging electrician. He was a member of IATSE Local 477 in Florida but, because of a lack of work opportunities there, had been working throughout the country. In particular, he had worked on about seven productions in Louisiana, within the Respondent Union's jurisdiction, from 2004 until the events at issue in this proceeding. He had not faced any opposition from the Respondent Union to his employment in Louisiana until he went to work for the Respondent Employer on the set of *The Green Lantern* on March 8. Within a few days, on March 11, he was told by Woods that he could not work on this production until he straightened out his paperwork with the Union.<sup>2</sup> The Board adopted my findings that this termination and the statement by Woods violated the Act.

Following his March 11 termination, Recio met with Business Agent McHugh in an attempt to "straighten out his paperwork." He completed an application for membership in the Union, established residency in Louisiana, and waited for his application to be approved by the members of the Union, as required by the constitution and bylaws. On April 12, He spoke to McHugh by phone from Florida and was told that the vote on his application had resulted in a tie. McHugh told Recio that he would re-submit the application at the next membership meeting in June and that Recio could return to work in the Union's jurisdiction as long as he notified McHugh on a show-to-show basis. On April 22, after a conversation with Woods, Recio returned to work on *The Green Lantern*. Recio only worked 4 days, April 22, 23, 26, and 28, before his employment again came to an end.<sup>3</sup>

Woods is also a member of the Union but holds no office.

During the period between his meeting with McHugh on March 17 and the April 12 telephone call in which McHugh told him he could return to work while his application was pending, Recio turned down a job offer within the Respondent Union's jurisdiction based on McHugh having told

As the Board noted, there are three conflicting accounts of what happened on April 28. Recio testified that he was told by his supervisor, Earl Woods, that he was no longer needed and that he should seek employment elsewhere. Woods denied terminating Recio, instead testifying that Recio told him at the end of the day that he "couldn't work here anymore, it wasn't worth it and that he was going back to Florida." McHugh, the business agent, denied any contact with Woods or any supervisor of Respondent Employer before Recio's termination, claiming he learned after that fact from another supervisor, David Dunbar, that there was not enough work for Recio to continue working on the production. There is no direct evidence of any communication between the Respondent Union and the Respondent Employer before Recio's employment ended on April 28.

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The only evidence offered by the Acting General Counsel to prove that Recio was fired and that the Respondent Union caused his termination is Recio's testimony and "circumstantial evidence" such as the timing of his termination shortly after Recio had withdrawn his application for membership in the Union and requested a refund of his application fee. Recio's testimony regarding the circumstances is far from clear. As pointed out by counsel for the Respondent Employer, there were internal inconsistencies in his testimony on the witness stand and conflicts between his testimony and statements he provided to the Board's regional office during the investigation. Recio himself admitted that he was "confused" about the sequence of events and had a poor memory.

Recio testified that he withdrew his application and requested a refund of the application fee because he needed the money. He admitted that maintaining two households, his residence in Florida where his family lived and the apartment he rented in Louisiana to establish residency for purposes of the application, was too costly. He also acknowledged being unhappy with the amount of work he was getting on *The Green Lantern*. If he was so desperate for money that he needed the \$450application fee to get by, it makes sense that he would have told Woods, as Woods claimed, that it was not worth it to him to keep working in Louisiana and he was going back to Florida to look for other work.

Recio's testimony regarding what Woods said also shifted throughout his testimony. At first, on direct examination, Recio claimed that Woods told him, by telephone the night of April 28, that he was no longer needed and that he should seek employment elsewhere. When asked if Woods gave him a reason, Recio testified that Woods told him "because his paperwork was not in order." This is the identical reason Recio claims Woods gave him the first time he was let go, on March 11. On further questioning, including by me, Recio testified that the only thing Woods said on April 28 was that Recio was no longer needed and to look for work elsewhere. In a supplemental affidavit he gave to the Region in November 2010, Recio had stated that "Woods just stated that he couldn't use me." Recio also acknowledged telling Woods that he was going to look for work as a wrestler because he "needed money to

him he could not work until his application was approved. This was also found violative of the Act.

pay my bills." This is consistent with Recio making a conscious decision to resign his employment in Louisiana and return to Florida to reduce his expenses.

Recio's testimony was also inconsistent regarding his contacts with representatives of the International Union. Although at times during his testimony he claimed he contacted Dan Mahoney, identified in the record as assistant director of motion picture and television production, before April 28, he admitted based on documentary evidence that he did not contact Mahoney until May, after he had returned to Florida. Recio complained to Mahoney that McHugh would not let him work in Louisiana even though McHugh had actually told Recio, on April 12, that he could go back to work and continue working in Louisiana while his application was pending. When the International Union's attorney Dale Short, called him later, he essentially confirmed this, telling Recio to return to work and to call Short if he encountered any problems. The fact that Recio did not return after this communication further supports a finding the he chose not to work in Louisiana for financial reasons unrelated to any unlawful conduct by the Respondent Union. Recio admitted as much during cross-examination by counsel for the Respondent Employer.<sup>4</sup>

Recio's testimony regarding his communications with Mahoney and Short after April 28 also supports McHugh's testimony that he contacted the Respondent Employer only after he heard from Mahoney about Recio's complaint. By then, Recio was already gone. It is also significant that McHugh's contact with the Respondent Employer was with Dunbar and not Woods. There is nothing in the record to contradict the testimony of Woods and McHugh that they did not communicate with one another regarding Recio during his second period of employment on *The Green Lantern*.

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After again considering the testimony at the hearing and the arguments of the parties, I find that Recio's testimony that he was terminated by Woods on April 28 is not credible. As noted above, there were many inconsistencies in his testimony regarding the events. Moreover he was admittedly confused about the sequence of events, confusing what Woods said on March 11 with his statements on April 28. Although the testimony of Woods and McHugh was not free from doubt, the weight of the evidence supports a finding that Recio made a conscious decision to resign and return to his home in Florida for financial reasons. Certainly there is no evidence that the Respondent Union objected to his continued employment, McHugh having told him he could return to work while awaiting a second vote on his application. Even after Recio quit, he was told by Attorney Short that he should return to work and to call Short if he experienced any problems. I find that it was Recio's voluntary decision not to follow this advice.

My previous finding that Recio was unlawfully discharged on March 11 is not inconsistent with my finding here. The testimony of Recio regarding that termination, while also not entirely clear, was at least corroborated by other evidence in the record supporting his version of events. In contrast, nothing in the record corroborates Recio's version of events on

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In a September 2010 letter to the investigating agent, Recio stated that he complained to McHugh about the number of days he was working on *The Green Lantern* and told McHugh that it was not enough to support Recio and his family.

April 28. Having found that Recio quit his employment on April 28, it is unnecessary for me to decide whether, had he been terminated, the Union caused his termination. Accordingly, based on the above and the record as a whole, I again find that the Acting General Counsel has not carried his burden of proof that Recio was fired on April 28 in violation of the Act.

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## Conclusions of Law

- 1. The Respondent Employer did not terminate Humberto Recio at the request of the Respondent Union on April 28, 2010, and did not violate Section 8(a)(1) and (3) as alleged in the complaint.
  - 2. The Respondent Union did not violate Section 8(b)(1)(A) and (2) by requesting the Respondent Employer to terminate Recio on April 28, 2010.
- On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

## SUPPLEMENTAL ORDER

The complaint is dismissed insofar as it alleges violations of the Act with respect to the Charging Party's April 28, 2010 termination of employment.

Dated, Washington, D.C., March 18, 2013.

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Michael A. Marcionese Administrative Law Judge

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If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.